No. 17-1625

In the Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,
Petitioners,

v.

ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RALPH OMAN AS AMICUS CURIAE SUPPORTING RESPONDENTS

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Am. Intellectual Property Law Ass'n, *2017 Report of the Economic Survey* (2017) 12

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Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 Rutgers L. Rev. 351 (2002) 8

John M. Conley & David W. Peterson, *The Role of Experts in Software Infringement Cases*, 22 Ga. L. Rev. 425 (1988) 9

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Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439 (2009) 12

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Ralph Oman has spent nearly his entire career implementing and studying U.S. copyright policy. In the 1970s and 1980s, Mr. Oman served on the staff of the Senate Subcommittee on Patents, Copyrights, and Trademarks (the Senate Judiciary subcommittee responsible for federal copyright policy), including as its Chief Counsel. During that time, Mr. Oman participated in the negotiation and enactment of many legislative measures, including the Copyright Act of 1976 ("1976 Act")—the interpretation of which is at issue in this case. From 1985 to 1993, Mr. Oman was the Register of Copyrights of the United States. As such, he served as the head of the U.S. Copyright Office and was statutorily charged with "[a]dvis[ing] Congress on national and international issues relating to copyright." 17 U.S.C. § 701(b)(1). Today, Mr. Oman is the Pravel, Hewitt, Kimball, and Kreiger Professorial Lecturer in Intellectual Property and Patent Law at The George Washington University Law School, where he has taught copyright law for over 25 years.

As a long-time steward and student of the U.S. copyright system, Mr. Oman is keenly interested in ensuring that it functions soundly. Based on his decades of experience and intimate knowledge of the

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[1] The parties have consented to the filing of this brief. Letters evidencing such consent have been provided to the Clerk of the Court. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amicus curiae and his counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

1976 Act and the copyright system as a whole, Mr. Oman believes that interpreting "full costs" in 17 U.S.C. § 505 to allow recovery of nontaxable costs—including, for example, the costs of expert witnesses—best effectuates the purposes underlying the Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The copyright system is designed to encourage innovation to promote the public good. Effective enforcement of copyrights is key to that end. And enforcement cannot be as effective if the costs of enforcement necessarily tax the potential recovery. The expansive and distinct suite of remedies in the Copyright Act reflects that calculus and evidences Congress's intent to make rightsholders whole for acts of infringement.

Excluding nontaxable costs from any potential recovery would fundamentally thwart that purpose and disincentivize meritorious claims. Expert witnesses, for example, are often critical to prosecuting a successful copyright case. Yet the cost of retaining them may significantly dilute any potential recovery. The risk of underenforcement is particularly acute with respect to individual rightsholders, where the damages recoverable often pale in comparison to the costs of litigating the case.

Allowing nontaxable costs to be recovered as part of the "full costs" otherwise available under § 505 would thus best effectuate the purposes of the Copyright Act.

ARGUMENT

INTERPRETING "FULL COSTS" TO INCLUDE RECOVERY OF NONTAXABLE COSTS BEST EFFECTUATES THE COPYRIGHT ACT'S PURPOSE

A. The Copyright Act Reflects Congress's Intent To Make Copyright Holders Whole

Copyright law grants authors a limited monopoly over their work, giving them a financial incentive to create. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558–59 (1985). But the reward to the individual is a mere "secondary consideration"; the primary purpose of copyright protection is to benefit the public as a whole. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948). That is, copyright protection "is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). "The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Harper & Row*, 471 U.S. at 546 (quoting *Sony Corp.*, 464 U.S. at 477 (Blackmun, J., dissenting)); *see* The Federalist No. 43, at 309 (James Madison) (Benjamin F. Wright ed. 1961) (copyright protection ensures that "[t]he public good fully coincides . . . with the claims of individuals").

But copyright protection can benefit authors—and thereby advance the public welfare—only if it is effectively enforceable. *See, e.g.*, Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277, 2280, 2290–91 (2013). That is

why "a copyright holder has always had the legal authority to bring a traditional infringement suit against one who wrongfully copies." *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1041 (9th Cir. 2018) (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 963 (2005) (Breyer, J., concurring)); *see, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25.

1. To make such suits worthwhile, the Copyright Act provides "a potent arsenal of remedies" against infringement. *Sony Corp.*, 464 U.S. at 433–34. The remedies include not just actual damages, but statutory damages, additional profits, and injunctive relief. *See* 17 U.S.C. §§ 502–504. The Act allows a court to award the prevailing party attorney's fees. *Id.* § 505. And, of course, it provides for the recovery of "full costs." *Id.* The suite of copyright remedies that go beyond actual damages (*e.g.*, statutory damages, additional profits, attorney's fees) represents a departure from the norm. Viewed as a collective, this "arsenal of remedies" is unique.

Consider, for example, attorney's fees. Under the American Rule, the parties to a civil suit must normally pay for their own attorneys. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). But it was historically understood that "[t]he amount of money frequently involved in copyright litigation . . . is trifling" compared to the cost of an attorney. Arthur W. Weil, *American Copyright Law* 530 (1917). If copyright holders could not recover attorney's fees, many would never vindicate their statutory rights—effectively immunizing infringers from legal liability and, worse still, discouraging innovation. *See Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 609–10 (7th Cir.

2002). To avoid that result, Congress departed from the American Rule in the Copyright Act, encouraging copyright holders to bring meritorious infringement claims by providing a critical tool to make them whole. *See* 17 U.S.C. § 505; Weil, *supra*, at 530; *accord* William S. Strauss, *The Damage Provisions of the Copyright Law, Study No. 22, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 86th Cong. 31 (Comm. Print 1960).

The Copyright Act's damages provisions provide another example of the same overarching intention. In addition to actual damages—the typical remedy in civil litigation generally—a copyright holder may also recover the defendant's incremental profits from infringement. *See* 17 U.S.C. § 504(b). And when a copyright holder cannot prove actual damages and profits—or when provable damages and profits are small—she may seek statutory damages instead. *See id.* § 504(c). Those remedies make it easier for a copyright holder to achieve a full recovery, and provide a financial incentive to bring meritorious infringement claims. As with attorney's fees, Congress included these unusual damages remedies to promote the development of creative works by compensating authors and deterring infringement. *See, e.g., F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231–33 (1952); S. Rep. No. 94-473, at 143 (1975). Put simply, the remedies available under the Copyright Act are designed to make the prevailing copyright holder no worse off than she would have been absent her successful infringement action.

2. The government nevertheless suggests that "there is no apparent policy reason that cost awards

should be governed by different rules in copyright suits than in patent and trademark cases." U.S. Amicus Br. 30. And there is, to be sure, often a tendency to look at copyright law alongside its intellectual property brethren. Here, though, that side-by-side comparison only further highlights the uniquely protective nature of the remedies provided under the Copyright Act.

For example, the Lanham Act and the Patent Act allow courts to award attorney's fees only in "exceptional cases." 15 U.S.C. § 1117(a); 35 U.S.C. § 285; *see Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553–54 (2014).[2] The Copyright Act, in contrast, grants courts discretion to award attorney's fees in any appropriate case, considering (among other things) the dual purposes of the Copyright Act's remedies—compensation and deterrence. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985–89 (2016).

Similarly, the Lanham Act and the Patent Act allow statutory damages only in special circumstances. *See, e.g.*, 15 U.S.C. § 1117(c) (use of counterfeit marks); 35 U.S.C. § 297 (invention promoters). The Copyright Act, by contrast, allows copyright holders who have timely registered their works to elect statutory damages instead of actual damages and profits in any infringement case. *See* 17

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[2] In *Octane Fitness*, the Court interpreted the "exceptional cases" standard in the Patent Act. Many courts have applied *Octane Fitness* to the Lanham Act since the standard for awarding attorney's fees is the same. *See Sleepy's LLC v. Select Comfort Wholesale Corp.*, __ F.3d __, 2018 WL 6174650, at *9 (2d Cir. Nov. 27, 2018) (applying *Octane Fitness* to the Lanham Act and collecting cases from the Third, Fourth, Fifth, Sixth, Ninth, and Federal Circuits).

U.S.C. §§ 412, 504(c). Congress understood that such a "special remedy" was necessary in copyright cases, because copyrights are especially hard to value and losses from infringement "may be impossible or prohibitively expensive to prove." H. Comm. on the Judiciary, 87th Cong., *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 102 (Comm. Print 1961).[3]

And while the Lanham Act and the Patent Act provide for the recovery of "costs" (*see* 15 U.S.C. § 1117(a); 35 U.S.C. § 284), the Copyright Act provides for the recovery of "full costs" (17 U.S.C. § 505). That term must be interpreted with the Act's distinct remedial scheme in mind. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

B. Categorically Excluding Nontaxable Costs From "Full Costs" Would Thwart Congress's Intent

Categorically excluding nontaxable costs from "full costs" would thwart Congress's intent to make copyright holders whole. Interpreting "full costs" to mean "taxable costs" would bar copyright holders from recovering, among other things, expert witness costs. But expert testimony is a routine part of copyright infringement litigation—as Congress well knew. And the costs of retaining expert witnesses are significant. Forcing plaintiffs to bear those costs

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[3] The Register of Copyright's 1961 Report was important to the production of the 1976 Act, and the Act largely adopted the Register's recommendations. *See Sony Corp.*, 464 U.S. at 462 n.9 (recounting the history of the 1976 Act's enactment).

would disincentivize enforcement—especially for individual rightsholders. Such a result cannot be squared with Congress's intent to provide full recovery.

1. Expert testimony is "routine" in copyright litigation. *See* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12:10[C] (2018); *see also, e.g.*, Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 Rutgers L. Rev. 351, 391 (2002) ("Expert witnesses are routinely employed by both plaintiffs and defendants, often at great expense."); *id.* at 391 n.171 (collecting sources).

Experts have testified in copyright cases for well over a century, and courts have long recognized that expert testimony is helpful to proving essential elements of infringement, such as similarity between two works. *See, e.g.*, *Lawrence v. Dana*, 15 F. Cas. 26, 56 (C.C.D. Mass. 1869); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). Indeed, in the years leading up to the 1976 Act's enactment, expert testimony was common, as the following cases illustrate:

- In *L. Batlin & Son, Inc. v. Snyder*, the district court granted an injunction preventing enforcement of a copyright, in part based on expert testimony that the defendant's plastic toy bank was a copy of the plaintiff's metal one. *See* 536 F.2d 486, 489 (2d Cir. 1976) (en banc).
- In *Bevan v. Columbia Broadcasting System, Inc.*, literary experts testified as to the similarities between the plaintiff's play and the television show *Hogan's Heroes*. *See* 329 F. Supp. 601, 604–07 (S.D.N.Y. 1971).

- In *Baldwin Cooke Co. v. Keith Clark, Inc.*, experts testified regarding the amount of damages and profits the defendant owed for infringing the plaintiff's copyright. *See* 420 F. Supp. 404, 406–08 (N.D. Ill. 1976).

The practical necessity of expert testimony could not have been lost on the Congress that enacted the 1976 Act. Beyond the ample case law involving experts leading up to the 1976 Act, Congress more generally understood that copyrightable works might include complex material, like software, making expert testimony necessary in many infringement cases. *See, e.g.*, H.R. Rep. No. 94-1476, at 54 (1976) (suggesting that copyrightable material potentially "includes . . . computer programs"); 3 Nimmer, *supra*, § 12:10[C] ("software . . . might be inaccessible to lay jurors"); John M. Conley & David W. Peterson, *The Role of Experts in Software Infringement Cases*, 22 Ga. L. Rev. 425, 429–39 (1988). That is, the Congress that enacted the 1976 Act both understood the necessity of expert testimony in copyright cases and retained the expansive and inclusive term "full costs." *See* Oracle Br. 23, 38, 48.

2. Expert testimony is not cheap. As this case illustrates, expert witness costs (and other nontaxable costs) can be substantial. *See* JA273–74, 294 (awarding nontaxable costs of $12.8 million, including $5.4 million of expert witness costs); *see also, e.g., Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9049 DOC (RNBx), 2011 WL 3420603, at *9 (C.D. Cal. Aug. 4, 2011) (awarding $31.7 million in costs, including expert witness costs and other nontaxable costs). But even in smaller cases, expert witnesses meaningfully add to the overall costs of litigation. *See, e.g., Remedies for Small Copyright Claims:*

Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 46 n.3 (2006) (statement of the U.S. Copyright Office) ("If expert witnesses are used, as is not uncommon in copyright cases, additional thousands of dollars or more in expenses can be incurred."); *Kourtis v. Cameron*, 358 F. App'x 863, 868 (9th Cir. 2009) (affirming award of $37,850 in expert witness costs on top of $166,234 in attorney's fees).

These costs will be part of the calculus when any sensible copyright holder is deciding whether to bring suit and, ultimately, can affect an author's decision on whether to create. *See* Balganesh, *supra*, at 2292–93. As a matter of common sense, a copyright holder will not incur the expense of litigation if she will pay more than she can recover. If faced with nontaxable costs of $50,000 and an expected economic benefit of, say, $30,000 (the maximum statutory damages award for non-willful infringement), the hypothetical copyright holder will not effectively pay $20,000 to enforce her copyright. And without the effective enforcement that is critical to copyright protection, the constitutional imperative for "Progress" will be impeded—all directly contrary to Congress's reason for providing a "potent arsenal of remedies" in the Copyright Act.

Precisely how the inability to recover expert witness costs (and other nontaxable costs) would impact innovation and copyright infringement litigation is difficult to quantify. From 2008 to 2017, more than 30 percent of copyright infringement cases were filed in the Ninth Circuit—which, of course, interprets "full costs" to include nontaxable costs. *See Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 884–85 (9th Cir. 2005), *cert. denied*, 548

U.S. 919 (2006).[4] Another 14.1 percent are brought in the Second Circuit. And while the Second Circuit has not itself opined on this issue, the Southern District of New York—where nearly three-quarters of copyright cases within the Second Circuit are filed—has awarded nontaxable costs as part of "full costs." *See Capitol Records, Inc. v. MP3tunes, LLC*, No. 07cv9931, 2015 WL 7271565, at *6 (S.D.N.Y. Nov. 12, 2015). In contrast, only the Eighth and Eleventh Circuits have followed petitioners' approach, and courts in those circuits hear comparably few copyright infringement cases—only 2.4 percent and 8.4 percent, respectively. In short, this would be a significant change to the status quo.

The impact would be especially severe for those most in need of the Copyright Act's remedies: individual authors who create the works protected by the Act, and who are least able to vindicate the rights granted by it.

Individual copyright holders often own copyrights that are worth a small amount relative to the cost of an infringement lawsuit. The cost of litigating a small-value case is disproportional to the value of the case—and often exceeds it. *See* U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* 25 (2013) ("*Copyright Small Claims*"). According to recent data, for example, the median cost

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[4] All percentages in this paragraph are based on calendar-year data from Lex Machina, which collects information on copyright case filings from the federal courts' PACER system. *See* Lex Machina, *Legal Analytics*, http://www.lexmachina.com (last visited Dec. 18, 2018). The Addendum further details copyright case filings from 2008 to 2017 by judicial district and circuit.

to litigate a copyright infringement lawsuit with less than $1 million at stake is at least $200,000. *See* Am. Intellectual Property Law Ass'n, *2017 Report of the Economic Survey* 44 (2017); *Copyright Small Claims*, *supra*, at 25. The value of an individual copyright, however, usually comes nowhere near that amount. As a result, even copyright holders who would likely win an infringement suit might choose not to bring one "because of the prohibitive costs and inherent difficulties" of litigation. *Copyright Small Claims*, *supra*, at 26.

Moreover, to obtain the full range of remedies available for copyright infringement—specifically, statutory damages and attorney's fees—a copyright holder must have timely registered the copyright with the Copyright Office. *See* 17 U.S.C. § 412. But individual authors "do not typically register their copyrights" in a timely manner, and therefore "rarely qualify for statutory damages or attorney's fee awards." Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 454 (2009). That is so because registration is impractical for many authors, who might own copyrights in numerous works. "For example, photographers have pointed out that they create hundreds or thousands of works in short periods of time, and often lack the resources to register all of the photographs to secure the full protections of the Copyright Act. These frustrations are shared by graphic artists, writers, and others, many of whom view the registration requirement as an obstacle to vindicating their rights, even apart from the significant costs of litigation once one gets to court." *Copyright Small Claims*, *supra*, at 108 (footnote omitted); *see also, e.g.*, *The Copyright*

Reform Act of 1993: Hearing on S. 373 Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on Judiciary, 103d Cong. 47–52, 108–15 (1994) (testimony of individual creators and their representatives supporting repeal of the registration requirement). The inability to recover expert witness costs (and other nontaxable costs) could introduce a further impediment to vindicating their rights. Indeed, it could discourage an individual author from authorizing her lawyer to secure crucial expert testimony needed to win the case—even when confronted with a barrage of expert testimony from the heavy artillery of a deep-pocketed defendant.

The American Intellectual Property Law Association ("AIPLA") argues that allowing copyright holders to recover nontaxable costs would "undercut the incentives Congress enacted in [17 U.S.C.] § 412 to encourage timely registration of works." AIPLA Amicus Br. 7. But that seems unlikely for two reasons. *First*, AIPLA offers no reason why denying nontaxable costs would actually "encourage timely registration of works." If a copyright holder does not timely register, she cannot recover statutory damages or attorney's fees. There is no reason to think that denying her nontaxable costs as well would tip the balance in favor of registration. *Second*, AIPLA's narrow interpretation of "full costs" would deny nontaxable costs to *all* copyright holders, even those who timely registered their copyrights. Rather than encourage timely registration, that would discourage the creation of copyrightable material by making it clear that a rightsholder will not, in fact, be made whole when it comes time to vindicate her statutory right.

In the end, interpreting "full costs" to mean only "taxable costs" would be contrary to the Copyright Act's design and purpose. It would mean that copyright holders could never recoup their expert witness costs (and other nontaxable costs), even in the clearest, most egregious cases of infringement. *See* 17 U.S.C. § 505. That would ensure an incomplete recovery in nearly every case and would hurt individual authors the most. Limiting "full costs" in this way would remove an important weapon from the "potent arsenal of remedies" Congress provided and pose an obstacle to the effective enforcement of copyrights—contrary to the Copyright Act's goals.

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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Table of Total Copyright Case Filings from 2008 to 2017 by Judicial District and Circuit, as Provided by Lex Machina 1a

ADDENDUM

The following table lists total copyright case filings from 2008 to 2017 by judicial district, as provided by Lex Machina:

Judicial District	Filings, 2008 to 2017	Percent of Total
C.D. Cal.	5,814	17.2%
S.D.N.Y.	3,531	10.4
N.D. Ill.	2,166	6.4
N.D. Cal.	1,408	4.2
D.N.J.	1,297	3.8
E.D. Pa.	1,149	3.4
M.D. Fla.	1,130	3.3
D. Colo.	1,108	3.3
D. Md.	949	2.8
S.D. Fla.	936	2.8
E.D.N.Y.	757	2.2
E.D. Mich.	747	2.2
E.D. Va.	691	2.0
S.D. Ohio	609	1.8
S.D. Tex.	605	1.8
N.D. Ohio	513	1.5
E.D. Cal.	503	1.5
S.D. Cal.	502	1.5
D. Or.	499	1.5
W.D. Wash.	486	1.4
D. Nev.	473	1.4
D. Mass.	467	1.4
N.D. Ga.	460	1.4

Judicial District	Filings, 2008 to 2017	Percent of Total
N.D. Tex.	392	1.2%
D. Ariz.	392	1.2
W.D. Tex.	360	1.1
D.D.C.	297	0.9
S.D. Ind.	289	0.9
D. Conn.	262	0.8
W.D. Mich.	253	0.7
D. Minn.	251	0.7
D. Utah	221	0.7
E.D. Mo.	206	0.6
E.D.N.C.	203	0.6
E.D. Wis.	197	0.6
N.D. Ind.	172	0.5
M.D. Tenn.	171	0.5
D. Haw.	168	0.5
M.D. Pa.	165	0.5
N.D.N.Y.	158	0.5
W.D. Wis.	137	0.4
E.D. Tenn.	134	0.4
W.D.N.C.	129	0.4
D.S.C.	128	0.4
E.D. Tex.	126	0.4
N.D. Fla.	126	0.4
E.D. La.	123	0.4
W.D. Pa.	121	0.4
W.D. Mo.	116	0.3
M.D.N.C.	111	0.3
C.D. Ill.	106	0.3

Judicial District	Filings, 2008 to 2017	Percent of Total
W.D. Ky.	88	0.3%
D.P.R.	80	0.2
D. Kan.	80	0.2
W.D.N.Y.	77	0.2
D. Del.	77	0.2
W.D. Okla.	69	0.2
W.D. Va.	68	0.2
W.D. Tenn.	62	0.2
S.D. Miss.	60	0.2
S.D. Iowa	58	0.2
N.D. Ala.	54	0.2
M.D. Ga.	49	0.1
D. Neb.	48	0.1
D.N.H.	48	0.1
N.D. Iowa	44	0.1
S.D. Ga.	43	0.1
D.R.I.	43	0.1
D. Idaho	40	0.1
D.N.M.	39	0.1
E.D. Ky.	38	0.1
E.D. Ark.	35	0.1
N.D. Okla.	33	0.1
D. Me.	33	0.1
S.D. Ill.	31	0.1
N.D. Miss.	31	0.1
M.D. La.	31	0.1
W.D. La.	27	0.1
W.D. Ark.	25	0.1

Judicial District	Filings, 2008 to 2017	Percent of Total
E.D. Wash.	24	0.1%
S.D. Ala.	22	0.1
D. Mont.	21	0.1
S.D. W. Va.	19	0.1
N.D. W. Va.	18	0.1
D.S.D.	15	0.0
M.D. Ala.	11	0.0
D. Alaska	11	0.0
D.N.D.	7	0.0
E.D. Okla.	7	0.0
D. Vt.	6	0.0
D. Wyo.	4	0.0
D.V.I.	3	0.0
D. Guam	1	0.0
Total	*33,894*	*100.0%*

The following table summarizes the prior data by circuit:

Circuit	Filings, 2008 to 2017	Percent of Total
Ninth	10,342	30.5%
Second	4,791	14.1
Seventh	3,098	9.1
Eleventh	2,831	8.4
Third	2,812	8.3
Sixth	2,615	7.7
Fourth	2,316	6.8
Fifth	1.755	5.2

Circuit	Filings, 2008 to 2017	Percent of Total
Tenth	1,561	4.6%
Eighth	805	2.4
First	671	2.0
D.C.	297	0.9
Total	*33,894*	*100.0%*